IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREGORY T. LISBON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	CIVIL ACTION NO. 03-6207
UNITED NATIONAL GROUP	:	
INSURANCE CO., LORI BRACY,	:	
AND KATHLEEN ROSATI,	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, S.J. February 21, 2006

Presently before the Court is Defendants United National Group, Lori Bracy and Kathleen Rosati's Motion for Summary Judgment (Docket No. 26), Plaintiff Gregory Lisbon's Motion in Opposition to Defendants' Motion for Summary Judgment[1] (Docket No. 31), Defendants' Reply (Docket No. 35) and Plaintiff's Surreply (Docket No. 36). For the reasons set forth below, Defendants' motion is **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appearing *pro se*,[2] Plaintiff began his employment with Defendant United National Group ("UNG") as a temporary employee in the Claims Department on approximately

1. The Court notes at the outset that Plaintiff's responses (Docket Nos. 32, 36) to Defendants' Motion fail to address the merits of his case and appear to be a word-for-word reiteration of the discovery arguments Plaintiff previously presented in his Motion for an Extension of Time for Discovery. (Docket No. 28.)

2. At the inception of this litigation, Plaintiff was represented by counsel. This Court granted Motion of Plaintiff's Counsel for Leave to Withdraw from Representation on March 24, 2004. (Docket No. 6.)

June 21, 2001. As a temporary employee, Plaintiff worked on a program that solely provided insurance coverage to tow truck operators.

On or about October 1, 2001, Defendant UNG hired Plaintiff as a permanent employee. As a permanent employee, Plaintiff handled his own group of pending claims made under numerous types of insurance policies carried by Defendant UNG. Plaintiff's responsibilities included "opening new files, issuing coverage letters, calendaring cases for review, communicating with the parties and attorneys involved" and "assessing cases and making recommendations regarding settlement." (Defs.' Mot. Summ. J. Ex. B ¶ 5.) Plaintiff was also responsible for maintaining an electronic diary in the course of reviewing and updating his pending claims. Id. ¶ 6.

Plaintiff reported to Defendant Lori Bracy ("Bracy"), the Casualty Claims Supervisor.[3] From the onset of Plaintiff's transition to permanent employment with Defendant UNG, Defendant Bracy "became concerned that he was not qualified for the position because he was not updating his diary and working his cases." Id. As early as December 7, 2001, Defendant Bracy met with Plaintiff to discuss her concerns regarding his job performance.[4] For example, Defendant Bracy's concerns included the fact that Plaintiff's caseload contained substantially fewer cases than that of other claims examiners. See Id. (comparing Plaintiff's caseload of 103 cases to that of other claims examiners whose caseload averaged 185 cases). Additionally, at the end of November 2001, 54 of Plaintiff's 103 cases were "'off-diary,' meaning that [Plaintiff]

3. Plaintiff reported to Defendant Bracy as both a temporary and permanent employee.

4. Defendant Bracy gave Plaintiff a memorandum summarizing their December 7, 2001 meeting on December 18, 2001. (Defs.' Mot. Summ. J. Ex. C.)

failed to review more than half of the claims in accordance with the calendar dates in his diary." Id. ¶¶ 6, 10. When Plaintiff did update the electronic diary for his cases, "the notes . . . were confusing and did not make sense for someone who was supposed to be experienced with handling insurance claims." Id. ¶ 7. Plaintiff was also unfamiliar with terminology common to insurance matters, did not know how to write a coverage letter, routinely settled cases above his authority, failed to open incoming mail for weeks and failed to immediate pass on "information concerning lawsuits filed against one of the company's insureds." Id. ¶¶ 7-9.

On January 17, 2001, Defendant Bracy again addressed her concerns regarding Plaintiff's job performance in a memorandum and placed him on a 30-day improvement plan.[5] Defendant Bracy again met with Plaintiff on March 27, 2002 to discuss his job performance. Defendant Bracy followed her March meeting with Plaintiff by writing a memorandum to Human Resources. (Defs.' Mot. Summ. J. Ex. E.) In her memorandum, Defendant Bracy indicated that she "advised [Plaintiff] that his employment with United National does not appear to be headed in a good direction," that "it is apparent that he is unable to met [sic] what is expected of him as a claims examiner," and that she "recommended he actively seek employment elsewhere." Id. at 2. Defendant UNG terminated Plaintiff's employment on April 19, 2002.

In response to Defendant Bracy's concerns about his job performance, Plaintiff concedes that he was unfamiliar with the electronic diary system and the variety of insurance policies offered by Defendant UNG. Plaintiff also concedes that he settled cases above his $10,000 settlement authority, failed to open mail and failed to forward lawsuits.

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5. Although Plaintiff did not confirm receiving this memorandum during his deposition, Plaintiff acknowledged that it summarized a discussion that he had with Defendant Bracy. (Defs.' Mot. Summ. J. Ex. A at 200.)

Plaintiff argues, however, that as both a temporary and permanent employee at Defendant UNG, he was sexually harassed by Defendant Bracy. For example, during Plaintiff's deposition, when asked to describe how he was sexually harassed, Plaintiff testified that Defendant Bracy: "brushed up" against him upon entering the cubicle of a co-worker (Defs.' Mot. Summ. J. Ex. A at 257); touched the top of his hands and made sounds while reviewing a file (Defs.' Mot. Summ. J. Ex. A at 250); commented that his cologne smelled good (Defs.' Mot. Summ. J. Ex. A at 236)' asked him to dinner (Defs.' Mot. Summ. J. Ex. A at 289, 291, 343); and, talked to him about her divorce. (Defs.' Mot. Summ. J. Ex. A at 249.) Plaintiff also alleges that Defendant Bracy asked him to have sex with her. (Defs.' Mot. Summ. J. Ex. A at 275.)

Plaintiff alleges that he informed Defendant Kathleen Rosati ("Rosati") of Human Resources about the several instances of sexual harassment on March 28, 2006, the day after Defendant Bracy counseled him for a third time about his poor job performance. It is undisputed, however, that as a temporary employee Plaintiff did not report the alleged sexual harassment to his temporary employment agency, and that as a permanent employee Plaintiff never reported the alleged sexual harassment to any supervisors. It is also undisputed that Plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) on December 19, 2002.[6] Subsequently, Plaintiff initiated this suit on November 11, 2003 alleging sexual harassment, hostile work environment and retaliation under Title VII and the Pennsylvania Human Relations Act (PHRA) against Defendant United National Group. Plaintiff also alleges aiding and abetting discrimination under the PHRA against Defendant Bracy and Defendant Rosati.

6. The EEOC issued a right-to-sue letter on August 27, 2003. (Pl.'s Compl. ¶ 3.)

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. The Court must examine the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. Id. at 255.

The moving party bears the initial burden of identifying the basis of the motion and the evidence which demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In order to avoid summary judgment, the burden shifts to the non-moving party to produce evidence that a reasonable fact-finder could find for that party. Anderson, 477 U.S. at 248-249. The non-moving party must go beyond the pleadings and produce evidence through affidavits, depositions or admissions to show that there is a genuine issue for trial. Celotex, 477 U.S. at 324. Further, "an affidavit that is essentially conclusory and lacking in specific facts is inadequate."[7] NLRB v. FES, 301 F.3d 83, 95 (citing Maldonado v. Ramirez, 757 F.2d 48 (3d Cir. 1985)).

7. Plaintiff replied to Defendants' Motion by submitted "Plaintiff's Affidavit in Opposition to Defendants' Motion for Summary Judgment." (Docket No. 32.)

An additional consideration is that Plaintiff pursued this lawsuit *pro se*. Although *pro se* litigants are generally held to less stringent standards, "a *pro se* plaintiff is not excused from complying with the rules of procedural and substantive law." Hatcher v. Potter, No. 04-2130, 2005 U.S. Dist. LEXIS 31742, at *2 (E.D. Pa. Dec. 7, 2005) (citing Faretta v. California, 422 U.S. 806, 835 n. 46 (1975)). Thus, "if a *pro se* plaintiff has been provided adequate information regarding what is expected of him and has ample opportunity to present opposing affidavits, but has nevertheless continually disregarded his obligations as a litigant, it would not be beyond the discretion of the court to dismiss his claims."[8] Gay v. Wright, No. 90-0770, 1990 U.S. Dist. LEXIS 12893, at * 8 (E.D. Pa. Sep. 27, 1990).

III. DISCUSSION

In analyzing summary judgment motions in cases involving employment discrimination, the Court uses the burden shifting analysis set forth in McDonnell Douglas v. Green. 411 U.S. 792 (1973). First, the plaintiff must establish a prima facie case for unlawful discrimination. Id. The burden then shifts to the employer to proffer a legitimate, nondiscriminatory reason for terminating the plaintiff. Id. Once the employer has offered a legitimate reason, the burden shifts back to the plaintiff to demonstrate that the proffered reason was merely pretextual. Geraci v. Moody-Tottrup, Int'l Inc., 82 F.3d 578, 580 (3d Cir. 1996) (citing McDonnell Douglas, 411 U.S. at 668). Additionally, in the Third Circuit, claims under Title VII and the PHRA are governed by the same legal framework. Jones v. Sch. Dist. of Phila.,

8. The Court granted Plaintiff considerable latitude during the course of this litigation. The Court extended the discovery deadline on several occasions. (Docket No. 12, Docket No. 17, Docket No. 23.) Additionally, the Court vacated the dismissal of Plaintiff's case for failure to comply with the Court's discovery order because it became clear after the Court's Order that some attempt at compliance was made. (Docket No. 34.)

198 F.3d 403, 410-411 (3d Cir. 1999). Therefore, the Court combines the discussion of Plaintiff's claims under Title VII and the PHRA below.

A. Sexual Harassment and Hostile Work Environment Claims against Defendant UNG

1. *Plaintiff's claim is time-barred*

As a threshold matter, the Court finds that Plaintiff's claims of sexual harassment and hostile work environment under Title VII are time-barred. A plaintiff asserting such claims is required to demonstrate that at least one of the alleged acts of harassment occurred within 300 days of the filing of his EEOC charge Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109 (2002). Alleged discrimination that occurs prior to the commencement of the 300-day limitation period is time-barred, pending the application of an equitable exception to this rule, such as waiver, estoppel, equitable tolling, or the continuing violation theory.[9] See Jones v. Univ. of Penn., No. 00-2695, 2003 U.S. Dist. LEXIS 6623, at *10 (E.D. Pa. Mar. 20, 2003); Zysk v. FFE Minerals, 225 F. Supp. 2d 482, 488 (E.D. Pa. 2001).

As Plaintiff noted in his deposition, Plaintiff filed his charge with the EEOC on December 19, 2002. Thus, Plaintiff must demonstrate that at least one of the alleged acts of harassment occurred between February 22, 2002 and December 19, 2002. In Plaintiff's Answers to Defendants' Interrogatories and his deposition, Plaintiff asserts numerous instances in which Defendant Bracy allegedly sexually harassed him as a temporary employee. For example, Plaintiff testified that while he was a temporary employee, Defendant Bracy "brushed up against"

9. To establish that a claim falls within the continuing violations theory, the plaintiff must demonstrate that at least one act occurred within the filing period. West v. Phila. Elec. Co., 45 F.3d 744, 754-55 (3d Cir. 1995) (citing United Airlines, Inc. v. Evans, 431 U.S. 553, 558 (1977)).

him and at several times commented on his cologne. Yet, Plaintiff notes that each of the alleged instances of sexual harassment occurred from approximately June 21, 2001 to September 26, 2001. These alleged instances are substantially outside of the requisite 300-day period.

In his deposition, Plaintiff also asserts numerous instances in which Defendant Bracy allegedly sexually harassed him as a permanent employee. Plaintiff testified that Defendant Bracy allegedly asked him to dinner while he "was a full-time, permanent employee . . .some time in October [2001]" and that Defendant Bracy again allegedly asked him to dinner "after the [2001] Christmas party." (Defs.' Mot. Summ. J Ex. A at 289, 343.) Plaintiff also testified that "between Thanksgiving and Christmas [2001]," Defendant Bracy allegedly discussed her divorce with him. Id. at 249-250. Again, each of these alleged instances is substantially outside of the requisite 300-day period.

Finally, Plaintiff testified that "around mid to the end of January, beginning of February [2002]," Defendant Bracy allegedly touched and rubbed his hands while reviewing a file with him. Id. at 250. Although this is the closest instance to the 300-day period, Plaintiff's testimony indicates that the latest such incident could have happened was the beginning of February 2002, several weeks outside of the 300-day period.[10] Because Plaintiff failed to demonstrate that one act occurred within the 300-day period, Plaintiff's claim is time-barred and the applicability of the continuing violation exception is foreclosed. Plaintiff also fails to

10. Plaintiff also testified that Defendant Bracy asked him to have sex. (Defs.' Mot. Summ. J. Ex. A at 278.) Plaintiff, however, was not able to provide a date or time frame as to when this alleged incident of harassment occurred. Id. Thus, the Court does not consider this alleged instance of sexual harassment to determine whether Plaintiff's claim is time-barred.

demonstrate that any other equitable exception, such as waiver, estoppel or equitable tolling applies.

Finally, Plaintiff's *pro se* status does not excuse his failure to comply with the appropriate limitation period for the filing of his EEOC complaint. Robinson v. S.E. Pa. Transp. Auth., No. 02-2550, 2002 U.S. Dist. LEXIS 15336, at *3 (E.D. Pa. Aug. 14, 2002) (applying 300-day limitation period to *pro se* plaintiff). Thus, the Court finds that Plaintiff's sexual harassment and hostile work environment claims are time-barred.[11]

2. ***Plaintiff's claim fails the burden shifting analysis***

i. Plaintiff's prima facie case

Even if Plaintiff's claims are not time-barred, the Court finds that Plaintiff has failed to establish a prima facie case of sexual harassment and hostile work environment.[12] In order to be actionable, the sexual harassment must be so severe or pervasive that it alters the

11. Although claims under Title VII and the PHRA are governed by the same legal framework, in contrast to Title VII, the PHRA requires a plaintiff to file an administrative complaint within 180-days of the last act of alleged discrimination. 43 PA. CONS. STAT. ANN. §§ 959(a)-(h), 962 (2005). Accordingly, because Title VII provides a longer period during which to file an administrative complaint, a claim barred under Title VII for failure to file a timely EEOC charge must also be considered untimely under the PHRA. See, e.g., Ryan v. Gen. Mach. Prods., 277 F. Supp. 2d 585, 591 (E.D. Pa. 2003).

12. A plaintiff who claims that he has been sexually harassed has a cause of action under Title VII if the sexual harassment was either: (1) a quid pro quo arrangement, i.e., harassment that involves the conditioning of employment benefits on sexual favors; or (2) if the harassment is so pervasive that it had the effect of creating an intimidating, hostile or offensive work environment. Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)). Plaintiff's complaint raises only a hostile work environment cause of action under Title VII. (Pl.'s Compl. ¶¶ 25-28.) Plaintiff indicated in his answer to interrogatories that "Defendant Bracy offered job advancements for sexual favors if accepted." (Pl.'s Answers to Defs.' Interrogs. ¶ 7(2)(I).) Yet, in Plaintiff's deposition, he was unable to provide any specifics and conceded that "she didn't say those exact words, but the reference that she implied, the meaning, was those words." (Defs.' Mot. Summ. J. Ex. A at 331.) Therefore, the Court declines to analyze Plaintiff's sexual harassment action under a quid pro quo theory.

conditions of the victim's employment and thus creates an abusive environment.[13] Weston v. Pennsylvania, 251 F.3d 420, 425-26 (3d Cir. 2001) (citation omitted.) In order to prevail on a claim of sexually hostile work environment under Title VII, the plaintiff must show that : 1) the employee suffered intentional discrimination because of [his] sex, 2) the discrimination was pervasive and regular, 3) the discrimination detrimentally affected the plaintiff, 4) the discrimination would detrimentally affect a reasonable person of the same sex in that position, and 5) the existence of respondeat superior liability. Kunin v. Sears & Roebuck & Co., 175 F.3d 289, 293 (3d Cir. 1999) (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990)).

a. Plaintiff Established that He Suffered Intentional Discrimination Because of His Sex.

Conduct which is devoid of sexual content or suggestion fails to meet the requirement that the employee suffered intentional discrimination because of his sex. Lulis v. Barnhart, 252 F. Supp. 2d 172, 177 (E.D. Pa. 2003); Clowes v. Allegheny Valley Hosp., 991 F.2d 1159 (3d Cir. 1993). For cases involving "sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit" and the intent to discriminate "should be recognized as a matter of course." Andrews, 895 F.2d at 1482. "A more fact intensive analysis, however, will be necessary where the actions are not sexual by their very nature." Id.

Even viewing the facts in a light most favorable to the Plaintiff, several of the

13. Defendants note that a plaintiff who claims that he has been sexually harassed has a cause of action under Title VII if the harassment was so pervasive that it had the effect of creating an intimidating, hostile, or offensive work environment. (Def.'s Mot. Summ. J. at 8) (quoting Andrews, 895 F.2d at 1482). As subsequent cases have noted, the Supreme Court's standard however of "severe or pervasive" is controlling. Jensen v. Potter, No. 04-4078, 2006 U.S. App. LEXIS 2316, at *11 n.3 (3d Cir. Jan. 31, 2006) (quoting Pa. State Police v. Suders, 542 U.S. 129, 133 (2004) (emphasis omitted)).

instances of sexual harassment that Plaintiff asserts were not likely intentional. For example, although Plaintiff stated that Defendant Bracy "brushed up" against him upon entering the cubicle of a co-worker, he conceded that the cubicle had a "tight aisle" and he is a "pretty big guy" and also acknowledged that Defendant Bracy's contact was likely inadvertent. (Defs.' Mot. Summ. J. Ex. A at 232, 257). Plaintiff indicated that he was harassed when Defendant Bracy asked him to go to dinner. Id. at 289, 291, 343. Plaintiff concedes, however, that on the first occasion, he was with a group of employees and on the second occasion; Defendant Bracy may have been inviting him to join other employees. Id. The Court finds that other alleged instances of sexual harassment asserted by the Plaintiff are devoid of sexual content, including Defendant Bracy telling Plaintiff his cologne smelled good and Defendant Bracy talking to Plaintiff about her divorce.

The only instances of sexual harassment which can be construed as containing sexual content, and therefore "recognized as a matter of course" of an intent to discriminate, are Plaintiff's allegation that Defendant Bracy asked him to have sex with her and Plaintiff's allegation that Defendant Bracy rubbed his hands while making noise. With respect to Plaintiff's allegation that Defendant Bracy asked him to have sex with her, the Court finds that no reasonable juror could give credence to Plaintiff's testimony regarding this alleged instance of sexual harassment. Plaintiff only mentioned this allegation at his deposition after defense counsel reminded Plaintiff that he included this allegation in his complaint. Id. at 275-76. Further, Plaintiff changed his testimony numerous times on this subject.[14] Plaintiff also could not

14. Plaintiff initially testified that he could not recall the exact words that Defendant Bracy used to ask him to have sex with her. (Defs.' Mot. Summ. J. Ex. A at 279). Plaintiff then testified that Defendant Bracy did not ask him to (continued...)

recall when Defendant Bracy made such a statement nor the context in which such statement was made. Id. at 276.

With respect to Plaintiff's allegation that Defendant Bracy rubbed his hands while making noises, the Court finds that Plaintiff has set forth sufficient information to satisfy this prong of his prima facie case for hostile work environment. Plaintiff notes in his Answers to Defendants Interrogatories that while reviewing a claim file, Defendant Bracy "while in the course of stroking [Plaintiff's] left hand/wrist [made] arousal sounds of a possible sexual encounter." (Pl.'s Answer to Defs.' Interrogs. ¶ 7(1)(I).) Plaintiff also testified to this instance of alleged sexual harassment in his deposition. (Defs.' Mot. Summ. J. Ex. A at 250.) Thus, the Court finds that Plaintiff has set forth sufficient information to satisfy the first prong of his prima facie case for a sexually hostile work environment.

b. Plaintiff Established that the Sexual Harassment was Pervasive and Regular.

"Discrimination is pervasive where the incidents of harassment occur either in concert or with regularity." Trunzo v. Ass'n of Prop. Owners of the Hideout, Inc., 90 Fed. Appx. 622, 625 (3d Cir. 2004). Additionally, incidents that are "casual, isolated or sporadic" and "manifest no regularity" cannot be deemed pervasive. Morris v. National R.R. Passenger Corp., 66 F. Supp. 2d 650, 665 (E.D. Pa. 1999). Viewing the facts in a light most favorable to the Plaintiff, although Plaintiff complained that Defendant Bracy touched the top of his hands and made sounds while doing so, he indicated that this conduct occurred during only two occasions.

14. (...continued)
have sex with her, but there "was an implication of having sex." Id. at 280-281. When questioned further, Plaintiff then recalled the exact words that Defendant Bracy said to him. Id. at 281. Plaintiff then recanted that Defendant Bracy made sexual comments to him, conceded that she did not make sexual comments to him, and testified that he "implied them." Id. at 326, 336.

(Defs.' Mot. Summ. J. Ex. A at 250.) Plaintiff indicated that he was harassed when Defendant Bracy asked him on two occasions to go to dinner. Id. at 289, 291, 343. Plaintiff indicates that Defendant Bracy talked to him about her divorce on one occasion. Id. at 250. Plaintiff also indicates that Defendant Bracy asked him to have sex with her on one occasion. Id. at 286.

The only incident which occurred with any regularity is Defendant Bracy telling Plaintiff on numerous occasions that his cologne smelled good. Plaintiff testified that from June 21, 2001 to September 26, 2001, Defendant Bracy commented numerous times on his cologne. Id. at 320-321. The Court finds that these instances combined with the other, sporadic or isolated instances to which Plaintiff testified, are sufficient to satisfy the second prong of Plaintiff's prima facie case for a sexually hostile work environment.

c. Plaintiff Established that the Sexual Harassment Detrimentally Affected Him.

Plaintiff must only establish that he subjectively perceived her work environment to be hostile or abusive, and not that he suffered "concrete psychological harm." Harris v. Forklift Sys., 510 U.S. 17, 22 (1993) ("A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers").

The Court finds that Plaintiff subjectively believed his work environment to be hostile. Plaintiff testified that he felt "defenseless," "uncomfortable," and "ashamed" by Defendant Bracy's alleged conduct. Id. at 236, 261, 287. Plaintiff indicated that he that did not like Defendant Bracy commenting that his cologne smelled good, that he "felt as though [it] was

not appropriate for me to be listening to" Defendant Bracy talk to him about her divorce and that he did not report the alleged sexual harassment because he did not want to be "signified as an outcast." Id. at 236, 249, 263. Plaintiff finally indicated that he discussed the alleged sexual harassment with his Christian counselor. (Pl.'s Answer to Defs.' Interrogs. at ¶ 7(2)(I).) Thus, the Court finds that Plaintiff set forth sufficient information to satisfy the third prong of his prima facie case for a sexually hostile work environment.

d. Plaintiff Failed to Establish that the Sexual Harassment Would Detrimentally Affect a Reasonable Person of the Same Sex in that Position.

Title VII does not protect a plaintiff who experiences conduct that is merely offensive or annoying, Morris v. Nat'l R.R. Passenger Corp., 66 F. Supp. 2d 650, 663 (E.D. Pa. 1999), nor was Title VII "designed to protect the overly sensitive plaintiff." Harley v. McCoach, 928 F. Supp. 533, 539 (E.D. Pa. 1996). Title VII also does not allow the Court to impose a "general civility code" on the workplace. Faragher v. City of Boca Raton, 524 U.S. 775, 778 (1998). Further, under this prong of the prima facie case for sexually hostile work environment, the Court must decide if a reasonable person in the Plaintiff's position would have viewed Defendant Bracy's actions as hostile or abusive. Harris, 510 U.S. at 17. The Court must consider "all the circumstances, including "(1) the frequency, (2) the severity (3) whether it is physically threatening or humiliating (rather than an offensive utterance), (4) whether it unreasonably interferes with employee's work performance and (5) the effect on employee's psychological well-being." Id. at 23.

The Court finds that a reasonable person would not find it hostile or abusive if someone told him that his cologne smelled good particularly when the person concedes, as

Plaintiff has, that he has "some pretty nice cologne on." (Def. Mot. Summ. J. at 12, Ex. A at 266.) Additionally, inadvertent bumping into a co-worker in a tight cubicle space, asking an employee to join them, likely in a group setting, for dinner, or talking about one's divorce is not likely considered hostile or abusive to a reasonable person.

Plaintiff's allegations that Defendant Bracy asked him to have sex with her and rubbing his hands while making what Plaintiff describes as "arousal sounds of a possible sexual encounter" require further consideration. Although Plaintiff is entitled to every favorable inference, the Court finds that the record is replete with factual gaps and that many of Plaintiff's claims are vague, undated and unsupported. Based on the record, it is difficult to determine the frequency and severity of the alleged instances. Further, Plaintiff fails to establish that such conduct affected his work performance or psychological well-being.[15] Thus, the Court concludes that a reasonable person would find Defendant Bracy's alleged actions hostile or abusive nor do the actions rise to the level of extreme conduct required for maintaining a hostile work environment claim under Title VII. Lulis, 252 F. Supp. 2d at 176 (citing Faragher, 524 U.S. at 788). Accordingly, the Court finds that Plaintiff has failed to establish the fourth prong of his prima facie case for a sexually hostile work environment.

15. Plaintiff notes that "he has not ascertained any type of medical treatment for the alleged infliction of emotional distress" thus, 1ending further support to the Court's conclusion that the alleged harassment did not affect Plaintiff's psychological stability. (Pl.'s Aff. Opp. Defs.' Mot. Summ. J. ¶ 1(a).) Although Plaintiff states that he "discussed these matter [sic] with [his] Christian counselor," Plaintiff provides no concrete evidence, such as an affidavit from his counselor or even specific meeting dates and times, to support a finding of psychological instability as a result of the alleged instances of sexual harassment.

e. Plaintiff Established the Existence of Respondeat Superior

Although Plaintiff's claim for a sexually hostile work environment fails by Plaintiff's failure to establish that the sexual harassment would detrimentally affect a reasonable person of the same sex in that position as indicated in the previous section, the Court will continue by addressing the fifth prong of Plaintiff's prima facie case. In Burlington Industries v. Ellerth, 524 U.S. 742, 765 (1998), the Supreme Court stated that "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."[16] A tangible employment action includes discharge, demotion, or undesirable reassignment. Id.

The parties do not dispute that Defendant Bracy was Plaintiff's supervisor both as a temporary, and a permanent, UNG employee. The parties also do not dispute that Plaintiff's employment was terminated effective April 19, 2002. Thus, the Court finds that Plaintiff established the fifth prong of his prima facie case for a sexually hostile work environment.

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16. Defendant UNG incorrectly points out that Plaintiff must demonstrate two elements to establish employer liability. (Def. Mot. Summ. J. at 15.) As Defendant UNG itself notes, "*when no tangible employment action* is taken, an employer can raise an affirmative defense to liability or damages by demonstrating the following two elements: 1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Id. (citing Ellerth, 524 U.S. at 765 (emphasis added)).

Assuming *arguendo* that "no tangible employment action" was taken by Defendant UNG, the Court finds that Plaintiff has set forth sufficient information to satisfy the fifth prong of his prima facie case for a sexually hostile work environment. Plaintiff admitted that he never reported to Defendant Bracy's supervisors that Defendant Bracy was sexually harassing him. (Defs.' Mot. Summ. J. Ex. A at 266) (noting that in response to Defendant Bracy commenting on his cologne, Plaintiff "just dismissed it. I just, you know, acted like I didn't hear it").) It is undisputed however that Plaintiff met with Defendant Rosati of Human Resources on March 28, 2002. Though Defendant Rosati's notes from the meeting do not reflect that Plaintiff informed her of any instances of sexual harassment (Defs.' Mot. Summ. J. Ex. F), Plaintiff contends that he told Defendant Rosati that Defendant Bracy was sexually harassing him at that time. **(Defs.' Mot. Summ. J. Ex. A at 306.)**

ii. Defendant UNG's Established a Legitimate, Non-Discriminatory Reason for Terminating Plaintiff.

As noted above, the Court finds that Plaintiff fails to establish a prima facie case for hostile work environment because he fails to show that the sexual harassment would detrimentally affect a reasonable person of the same sex in that position. Even if Plaintiff could establish his prima facie case for a sexually hostile work environment, the Court finds that Defendant UNG has a legitimate, non-discriminatory reason for Plaintiff's discharge.

Defendant UNG argues that its legitimate and non-discriminatory reason for Plaintiff's discharge is Plaintiff's poor job performance from the onset of his transition from temporary to permanent status at UNG. Defendant UNG sets forth several reasons why Plaintiff's job performance was poor: Plaintiff's caseload was significantly less than that of other claims examiners, Plaintiff consistently failed to update the electronic diary with respect to his cases, and when Plaintiff did update his cases in the electronic diary such updates were incoherent and insufficient. Further, Plaintiff was unfamiliar with relevant insurance terminology, did not know how to write a coverage letter, routinely settled cases above his authority, failed to open incoming mail for weeks, and failed to forward information regarding lawsuits to his supervisors. The record indicates that Plaintiff concedes to virtually all of Defendant UNG's examples of his poor job performance.

Despite his poor job performance, the record also indicates that as early as December 7, 2001, Defendant Bracy began counseling Plaintiff with respect to his job performance. When his work job performance did not improve, Defendant Bracy again reiterated her concerns in a memorandum and placed Plaintiff on a 30-day improvement plan. Defendant

Bracy met with Plaintiff a second time on March 27, 2002 and followed up this meeting with a memorandum to Human Resources on March 28, 2002. **Thus, it was only after several attempts to inform Plaintiff of his weaknesses and assist him in improving his job performance that Plaintiff was fired. Therefore, the Court finds Defendant UNG had a legitimate, non-discriminatory reason for Plaintiff's termination.**

iii. Plaintiff Failed to Establish Pretext.

Because the Court finds that Defendant UNG has successfully set forth a legitimate, non-discriminatory reason for Plaintiff's discharge, the burden shifts back to the Plaintiff to establish that Defendant UNG's explanations are pretextual and unworthy of credence. Kautz v. Met-Pro Corp., 412 F.3d 463, 467-68 (3d Cir. 2005). Plaintiff must point to some evidence, direct or circumstantial, from which a fact-finder could reasonably either: (1) disbelieve defendant's articulated legitimate reasons or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determining cause of defendant's actions. Fuentes v. Perksie, 32 F.3d 759, 764 (3d Cir. 1994). Thus, Plaintiff must demonstrate such "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in Defendant UNG's proffered legitimate reasons such that a "reasonable fact-finder could rationally find them unworthy of credence and hence infer that the proffered nondiscriminatory reasons did not actually motivate" Defendant UNG's actions. Id. at 764-765.

Plaintiff provides no evidence in the form of affidavits, depositions, or otherwise to discredit Defendant UNG's reason for Plaintiff's discharge. In fact, as noted above, Plaintiff concedes that virtually all of Defendant UNG's assertions with respect to his poor job performance are valid. Plaintiff's "mere pronouncements or subjective beliefs . . . [are] not a

substitute for competent evidence." Martin v. Healthcare Bus. Res., No. 00-3244, 2002 U.S. Dist. LEXIS 5117, at * 18-19 (E.D. Pa. 2002) (citation omitted). Therefore, even if Plaintiff could establish the prima facie case for a sexually hostile work environment, the Court finds that Plaintiff could not counter Defendant UNG's legitimate, non-discriminatory reason for Plaintiff's termination.

3. *Conclusion*

For the foregoing reasons, the Court grants summary judgment in favor of Defendant UNG on the claims of sexual harassment and hostile work environment. First, Plaintiff's claims of sexual harassment and hostile work environment are time-barred. Even if Plaintiff's claims were not time-barred, Plaintiff has failed to establish a requisite element of his prima facie case - that the sexual harassment would detrimentally effect a reasonable person of the same sex in that position. Finally, Defendant UNG has a legitimate, non-discriminatory for Plaintiff's discharge and Plaintiff failed to put forth any evidence indicating that Defendant UNG's reason is mere pretext.

B. Retaliation Claim against Defendant UNG

The Court finds that Plaintiff has failed to establish a prima facie case of retaliation. In order to make out a prima facie case of retaliation under Title VII, an employee must demonstrate that, (1) he engaged in protected activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity and, (3) a causal link between the protected activity and the adverse employment action. Weston, 251 F.3d at 420.

With regard to Plaintiff's prima facie case of retaliation, Defendant Rosati's notes from the meeting do not reflect that Plaintiff informed her of any instances of sexual harassment

(Defs.' Mot. Summ. J. Ex. F). Yet, Plaintiff contends that he told Defendant Rosati that Defendant Bracy was sexually harassing him on March 28, 2002. (Pl.'s Compl. at 21, Defs.' Mot. Summ. J. Ex A at 267). Thus, the Court finds that, viewing the facts in a light most favorable to the Plaintiff, a genuine issue of material fact exists as to whether Plaintiff engaged in a protected activity and therefore, Plaintiff has established the first prong of his prima facie case for retaliation.

Second, it is undisputed that Defendant fired Plaintiff on April 19, 2002. Termination in and of itself is an adverse employment action. See Abramson v. William Paterson Coll., 260 F.3d 265, 288 (3d Cir. 2001) (noting "termination clearly fulfills the second prong of the prima facie case for a retaliation claim"). Thus, the Court finds that Plaintiff established the second prong of his prima facie case for retaliation.

Finally, with respect to the final prong of Plaintiff's prima facie case for retaliation, establishing a casual connection between the protected activity and the adverse employment action, the Court finds that Plaintiff has not put forth any evidence to establish a genuine issue of material fact. A finding of a causal connection, requires the Court to focus on two factors: (1) the "temporal proximity" between the protected activity and the alleged discrimination and (2) the existence of "a pattern of antagonism in the intervening period."[17] See Abramson, 260 F.3d at 288 (3d Cir. 2001) (quoting Woodson v. Scott Paper Co., 109 F. 3d 913, 920-21 (3d Cir. 1997)). For purposes of analysis, the Court finds that the protected activity in the

17. The Court recognizes that showing "temporal proximity" and a "pattern of antagonism" are not the only means by which a plaintiff can establish causation in establishing his prima facie case for retaliation under Title VII. "Proffered evidence, looked at as a whole, may suffice to raise the inference of causation." Farrell v. Planters Lifesaver Co., 206 F.3d 271, 280 (3d Cir. 2000). In light of Plaintiff's poor job performance, even viewing the proffered evidence as a whole, Plaintiff fails to raise an inference of causation between Plaintiff's meeting with Defendant Rosati on March 28, 2002 and his termination.

present case is Plaintiff's meeting with Defendant Rosati of Human Resources on March 28, 2002.[18] The adverse employment action is Plaintiff's discharge on April 19, 2002. Therefore, the relevant time interval is the twenty-two days that separate the date of Plaintiff's protected activity and the date of Plaintiff's termination.

Though Plaintiff does not rely on temporal proximity to establish causation, the Court notes that "the timing of the alleged retaliatory action must be *unusually* suggestive of retaliatory motive before a causal link will be inferred." Zappan v. Pa. Bd. of Prob. & Parole, No. 00-1409, 2003 U.S. Dist. LEXIS 3140, at *9 (E.D. Pa. Nov. 25, 2003) (emphasis added). Compare Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183 (finding that ten days between plaintiff's protected activity and her firing is unusually suggestive), Jalil v. Avdel Corp., 873 F.2d 701 (3d Cir. 1989) (finding that two days between plaintiff's protected activity and her firing is unusually suggestive), with Pritchett v. Imperial Metal & Chem. Co., No. 96-0342, 1997 U.S. Dist. LEXIS 13841, at *12 (E.D. Pa. Sept. 8, 1997) (finding that the passage of two months is not unnecessarily suggestive). Here, twenty-two days passed between Plaintiff's protected activity, the filing of his EEOC charge, and his termination. Thus, the Court finds that the timing between Plaintiff's filing of an EEOC charge and his termination is not unusually suggestive.

Yet, the "mere passage of time is not legally conclusive proof against retaliation." Robinson v. SEPTA, 982 F.2d 892, 894 (3d Cir. 1993). Where a long period of time has passed between the protected activity and the adverse employment action, "a plaintiff can establish a

18. It is undisputed that Plaintiff filed his charge with the EEOC on December 19, 2002. The filing of an EEOC complaint constitutes a protected activity under Title VII. Robinson v. City of Philadelphia, 120 F.3d 1286, 1301 (3d Cir. 1997). Yet, because Plaintiff filed his charge with the EEOC *after* Defendant UNG fired Plaintiff, the adverse employment action precedes the protected activity, and the Court finds that Plaintiff cannot establish a causal connection.

link between his or her protected behavior and subsequent discharge if the employer engaged in a pattern of antagonism in the intervening period." Woodson v. Scott Paper Co., 109 F.3d 913, 920-21 (3d Cir. 1997). The Court finds that Plaintiff has failed to present any evidence to support a finding that Defendants engaged in a "pattern of antagonism" from March 28, 2002 to April 19, 2002, the twenty-two day interval. Plaintiff testified that the last alleged incident of harassment occurred in early February 2002. (Def. Mot. Summ. J. Ex. A at 250.) As noted above, Plaintiff testified that "around mid to the end of January, beginning of February [2002]," Defendant Bracy allegedly touched and rubbed his hands. Id. **Therefore, even viewing the evidence in the light most favorable to Plaintiff, the Court holds that a reasonable jury could not find a causal link between the protected activity and the adverse employment action in this case.**

Further, as noted above in Sections II(A)(2)(ii) and (iii), even if Plaintiff was able to establish a prima facie case of retaliation, Defendant UNG had a legitimate, non-discriminatory reason for Plaintiff's termination, and Plaintiff failed to put forth any evidence that Defendant UNG's reason for terminating Plaintiff was a pretext.

For the foregoing reasons, the Court grants summary judgment in favor of Defendant UNG on the claim of retaliation.

C. Aiding and Abetting Claim against Defendant Bracy and Defendant Rosati

Section 955(e) of the PHRA provides that it is illegal for any employee "to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice." 43 PA. CONS. STAT. ANN. § 955(e) (2005). The Court finds it unnecessary to address Plaintiff's aiding and abetting claim under the PHRA against Defendant Bracy and Defendant Rosati. As noted above, the Court is granting summary judgment in favor

of Defendant UNG with respect to Plaintiff's sexual harassment, hostile work environment and retaliation claims under both Title VII and the PHRA. Thus, the Court grants summary judgment in favor of Defendant Bracy and Defendant Rosati on Plaintiff's Aiding and Abetting Claim under the PHRA.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is granted. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREGORY T. LISBON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	CIVIL ACTION NO. 03-6207
UNITED NATIONAL GROUP	:	
INSURANCE CO., LORI BRACY,	:	
AND KATHLEEN ROSATI,	:	
	:	
Defendants.	:	

O R D E R

AND NOW, this 21st day of February, 2006, upon consideration of Defendants' Motion for Summary Judgment (Docket No. 26), Plaintiff's Response (Docket No. 32), Defendants' Reply (Docket No. 35), and Plaintiff's Surreply (Docket No. 36), it is hereby **ORDERED** that Defendants' Motion for Summary Judgment is **GRANTED.** Judgment is entered in favor of defendants United National Group Insurance Company, Lori Bracy and Kathleen Rosati, and against plaintiff Gregory T. Lisbon.

This case is **CLOSED.**

BY THE COURT:

s/ Ronald L. Buckwalter, S. J.
RONALD L. BUCKWALTER, S.J.